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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

RECENT STATE DECISIONS

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ENVIRONMENTAL NEWS

ASTM INTERNATIONAL ISSUES NEW PHASE I ENVIRONMENTAL SITE ASSESSMENT STANDARD

ASTM International recently published a new technical due diligence standard for Phase I environmental site assessments (ESAs). The new standard, E1527-21, contains many of the same requirements as the prior standard, but there are several notable revisions. Key changes include directions for addressing emerging contaminants, which are not currently regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) such as per- and polyfluoroalkyl substances (PFAS), as well as an expansion of the ESA process to include more historical research. Environmental practitioners should be aware of the new standard to ensure that the scope of any due diligence examination meets current industry standards and to reduce risk of potential liability including under CERCLA.

Background

The U.S. Environmental Protection Agency's (EPA) All Appropriate Inquiries (AAI) Rule sets forth the minimum level of due diligence required to avoid liability under CERCLA. More specifically, innocent landowners, contiguous property owners, or bona fide prospective purchasers must comply with the AAI Rule and other requirements to avoid CERCLA liability. (40 C.F.R. § 312.1(b).) The AAI Rule also is relevant for recipients of federal Brownfield grants that must properly characterize a site. As a result, Phase I ESAs for commercial real estate transactions and other due diligence matters usually comply with EPA's AAI Rule to identify environmental liability issues.

In addition, the current version of EPA's AAI Rule incorporates ASTM International's old ESA standard, E1527-13, for purposes of satisfying the AAI Rule. However, on March 14, 2022, EPA issued a final rule, which will incorporate ASTM International's new standard (E1527-21) into the AAI Rule. (EPA, Standards and Practices for All Appropriate Inquiries, 87 Fed. Reg. 14,174 (March 14, 2022); 40 C.F.R. § 312.11.) Although EPA also published a proposed rule soliciting written comments on this action, EPA does not anticipate receiving significant negative feedback on this action and the rule is expected to go into effect on May 13, 2022. Once the AAI Rule incorporates the new standard, compliance with E1527-21 will provide similar protections as under the old rule.

ASTM International's New Standard – E1527-21

Emerging Contaminants

As noted above, ASTM International's new standard (E1527-21) includes directions for how emerging contaminants can be addressed in ESAs. Although the new standard does not create a requirement to address specific emerging contaminants such as PFAS, the new standard adds emerging contaminants to the list of "non-scope" considerations that a prospective purchaser may want to evaluate.

Likely the biggest emerging contaminant receiving the most attention is PFAS. It is important to keep in mind, however, that PFAS refers to a broad class of thousands of different types of chemicals, which are highly fluorinated manmade compounds. Indeed, PFAS are highly ubiquitous and have been found in drinking water supplies. Moreover, because PFAS are resistant to heat, water and oil, PFAS have been used in a wide range of products designed to be waterproof, stain-resistant or non-stick, such as carpets, furniture, cookware, clothing, and food packaging.

PFAS have also been used in fire suppression foams known as aqueous film-forming foams (AFFF), which are likely to be stored and used at fire training facilities, as well as other industrial facilities such as refineries and bulk fuel storage facilities for fire suppression, fire training, and flammable vapor suppression. Further, PFAS compounds are routinely added to different equipment components such as fuel system seals, hoses, and gaskets to improve reliability and safety.

Under the new ASTM standard, PFAS are considered a "non-scope" issue because currently no PFAS

are identified as hazardous substances under CERCLA. However, EPA is developing a rulemaking to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS)—two of the more prevalent PFAS compounds—as hazardous substances under CERCLA. This rulemaking is expected later this year. Further, EPA intends to develop a separate rulemaking to seek public comment on whether other PFAS compounds should similarly be listed under CERCLA.

In light of the ASTM update, extensive presence of PFAS in the environment, and increasing scrutiny surrounding PFAS contamination at both the federal and state level, parties conducting due diligence should evaluate whether any commercial real estate property under review was ever used for industrial or manufacturing purposes where PFAS were used.

Historical Use Research

ASTM's new standard also expands the scope of historical use research for the subject property, adjoining properties, and surrounding area.

When reviewing the subject property, in general the new standard only requires reviewing as many historical resources as necessary to determine the likelihood that past uses resulted in the presence of hazardous substances. Specific resources that should be examined include: 1) aerial photographs, 2) fire insurance maps, 3) local street directories, and 4) topographic maps. If the environmental professional does not consult these resources for the subject property, the environmental professional must explain why in the Phase I ESA report. Moreover, if in the opinion of the environmental professional additional resources should be reviewed to further help identify the likelihood of past uses that led to recognized environmental conditions, then other historical resources should be evaluated including: 1) building department records, 2) interviews with persons knowledgeable about past uses, 3) property tax files, and 4) zoning/land use records.

The new standard also adds specific requirements for researching the history of adjoining properties. For adjoining properties, the environmental professional must also review, where consulted for the subject property: 1) aerial photographs, 2) fire insurance maps, 3) local street directories, and 4) topographic maps. If the environmental professional does not consult these resources for the adjoining property, but did for the subject property, the environmental professional must explain why in the Phase I ESA report.

Finally, the new standard also requires that uses in the surrounding area be identified. However, uses of properties in the surrounding area must be identified only to the extent that the information is revealed in the course of researching the subject property itself.

Conclusion and Implications

Environmental practitioners that work on due diligence matters and other commercial real estate transactions should review ASTM International's new Phase I ESA standard. This development is especially noteworthy and timely since EPA has already issued a rule that will incorporate the new standard into the AAI Rule on May 13, 2022.
(Patrick Veasy, Hina Gupta)

REGULATORY DEVELOPMENTS

FEDERAL ENERGY REGULATORY COMMISSION ISSUES DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE DECOMMISSIONING OF FOUR KLAMATH RIVER DAMS

On February 25, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Environmental Impact Statement (DEIS) evaluating the effects of the surrender, decommissioning, and removal of four dams along the Klamath River in Klamath County in south-central Oregon and Siskiyou County in north-central California. The DEIS analyzes the effects of decommissioning the dams on consumptive water issues, flooding, aquatic biota, revegetation, dewatering, and recreation, among other matters. The DEIS recommends that the parties surrender their license and decommission the dams pursuant to the staff alternative, which includes mitigation measures and state- and federally- mandated conditions.

Background

The Lower Klamath Hydroelectric Project (Project) involves four hydroelectric facilities (dams) located on the Klamath River in Oregon and Northern California. They include J.C. Boyle (Oregon), Copco No. 1 (California), Copco No. 2 (California), and Iron Gate (California). (DEIS at 1-1; *In the Matter of WQC for Klamath River Renewal Corporation Lower Klamath Project License Surrender*, California State Water Resources Control Board WQC 202000408-025 at p. 5.) The Project spans over 390 acres of federal lands and an additional 5.75 acres for transmission line right-of-way. (DEIS at 1-1.) The dams "currently generate approximately 686,000 megawatt-hours (MWh) annually." (*Id.* at ES-xxxi.)

In 2004, PacifiCorp, the owner of the Project, applied to relicense the Project. (DEIS at 1-2.) In response thereto, FERC issued an environmental impact statement, which recommended a new license with considerable mandatory conditions and operation changes. (*Id.* at 12-3.) PacifiCorp concluded that such conditions were cost-prohibitive, and PacifiCorp, FERC, Tribes, and other interested parties began negotiations to decommission the Project. (*Ibid.*)

In 2010, 47 parties reached an initial settlement regarding the Project's license surrender. (DEIS at 1-3.) Six years later, in 2016, PacifiCorp, California, Oregon, the Department of the Interior, the National Marine Fisheries Service (NMFS), the Yurok Tribe, the Karuk Tribe, local governments, irrigators, and conservation and fishing groups, among other parties, reached an amended settlement, the Klamath Hydroelectric Settlement Agreement. (*Ibid*; Klamath River Renewal Corporation, "FERC Releases Draft Environmental Impact Statement for Klamath Dam Removal Project" (Feb. 25, 2022) [River Renewal Corporation Press Release], https://klamathrenewal.org/ferc-releases-draft-environmental-impact-statement-for-klamath-dam-removal-project/)

The Klamath Hydroelectric Settlement Agreement formed the Klamath River Renewal Corporation (River Renewal Corporation), a nonprofit organization, formed to take ownership of the dams. (River Renewal Corporation Press Release.) To this end, FERC approved an application for transfer of the Project from PacifiCorp to River Renewal Corporation, the State of Oregon, and the State of California. (DEIS at ES-xxx.) And in November 2020, River Renewal Corporation and PacifiCorp submitted an amended application to surrender the Project license and begin deconstruction and decommissioning of the Project. (*Ibid.*) As a result, FERC produced the DEIS in accordance with its obligations under the National Environmental Policy Act of 1969 (NEPA).

Summary of the DEIS

Pursuant to NEPA's requirements, the DEIS analyzes three alternatives: 1) River Renewal Corporation and PacifiCorp's proposed action as set forth in the surrender application; 2) the proposed action with Commission staff modifications; and 3) no action. (DEIS at 2-1.) The DEIS compares the alternatives' effects starting from a baseline of preserving the status quo, i.e., based on existing conditions at the time that the DEIS is developed. The DEIS analyzes the extensive tradeoffs affecting FERC's decision.

The action alternatives both involve the decommissioning and destruction of the dams and connected facilities. (DEIS at 2-1.) The action alternatives' objectives are to "[a]dvance the long-term restoration of the natural fish populations in the Klamath River Basin," improve the long-term water quality conditions, address the conditions causing high disease rates among Klamath River salmonids, and "[r]estore anadromous fish passage to viable habitat." (DEIS at 1-6.) The proposed action includes 16 environmental measure plans, each with various subparts. The more detailed plans pertain to reservoir drawdown and diversion, water quality monitoring and management, and aquatic resources. Under the water quality monitoring and management plan, the parties will have to work with the California State Water Resources Control Board (State Board) and the Oregon Department of Environmental Quality (Oregon DEQ) to address agencies' Water Quality Certifications' (WCQ) requirements and conditions. (*Id.* at 2-3-4.) The most extensive plan is the aquatic resources management plan, which corresponds with the action alternatives' objectives and provides plans for the following aquatic matters: spawning habitat, listed sucker salvage, fish presence monitoring, tributary mainstream connectivity, juvenile salmonid and Pacific Lamprey rescue and relocation, and the hatcheries management and operations. (DEIS at 2-15-16.)

Decommissioning and deconstructing the dams will result in permanent beneficial effects to, among other resources, water right transfers, water quality, and Tribal trust resources, in particular, aquatic and terrestrial resources. (DEIS at ES-lxiii-lxiv.) Most significantly, River Renewal Corporation's proposed alternative will improve aquatic resource habitat for the federally protected coho salmon, chinook salmon, steelhead, and Pacific lamprey, although the deconstruction also will result in short-term, significant, and unavoidable adverse effects. (DEIS at ES-lix-lx.) In addition, although the deconstruction of the hydropower facilities will result in a loss of renewable hydropower, PacifiCorp will offset the negative effects through a:

> . . .power mix at a rate that more than covers the loss from the baseline condition to comply with the California Renewable Portfolio Standard. (DEIS at ES-lxvii.)

The Modified Action

FERC recommends that River Renewal Corporation and PacifiCorp implement the modified action. The modified action includes all of the proposed action's mitigation measures and plans, as well as the conditions set forth in California Water Board's and the Oregon DEQ's WQCs, and NMFS' and U.S. Fish and Wildlife Service's (FWS) [Biological Opinions'] (BiOps) requirements. (*Id.* at ES-xxxv.) The staff modifications prohibit any surface disturbance until the relevant parties complete all "consultations, final management plans, delineations, pre-drawdown mitigation measures, agreements, and wetland delineations." (DEIS at ES-xxxv.) The modifications also require that River Renewal Corporation: 1) adopt specified measures to minimize effects of deconstruction activities on air quality and purchase carbon offsets; 2) create measures in the California Slope Stability Monitoring Plan for the repair and replacement of structural damage to private properties abutting Copco No. 1 Reservoir, 3) develop measures for its translocation of freshwater mussels; 4) create an eagle conservation plan; 5) add criteria in its Terrestrial Wildlife Management Plans for "potential removal of structures containing bats between April 16 and August 31"; 6) prepare a supplemented Historic Properties Management Plan "to incorporate the pre- and post-drawdown requirements for cultural resources inspections, surveys, evaluations, mitigation, and management"; and 7) modify its Fire Management Plan, in coordination with the California Department of Forestry and Fire Protection, Oregon Department of Forestry, and the Fire Safe Council of Siskiyou County, to address issues raised by stakeholders. (DEIS at ES-xxxv-xxxvii.)

The No Action Alternative

The no action alternative, were FERC to adopt it and if PacifiCorp or River Renewal Corporation intended to continue hydropower generation, would require proceeding with relicensing the Project. (DEIS at ES-xxxviii, 2-1.) Until relicensing proceedings finished, operations would continue with no changes. (*Id.* at ES-xxxviii.) Thus, the existing conditions would persist. However, the existing conditions and continued operation of the facilities would result in long-term, significant, adverse effects to, inter alia: 1) sediment transport; 2) special status plan species;

and 3) threatened and endangered species. (*Id.* at ES-x1ii-iii.) For example:

> . . .the no-action alternative would not address the water quality and disease issues which, when combined with the ongoing trend of increased temperatures, poses a substantial risk to the survival of one of the few remaining [chinook] salmon populations in California that still sustain important commercial, recreational, and Tribal fisheries. (DEIS at ES-xxxviii.)

The recommended course of action and the dams' deconstruction inevitably will lead to substantial changes in the ecosystem of the Klamath River. (*See*, DEIS at 2-22.) These changes will attempt to restore the ecosystem to the benefit of natural vegetation and fish populations, as well as water quality and terrestrial wildlife preferring upland habitats. However, the changes also will have significant adverse effects on flood management and habitat for wildlife that prefer reservoir habitats, and it will result in short-term less than significant adverse effects while deconstruction takes place and the vast changes resulting therefrom occur. As dam decommissioning and destruction becomes more commonplace, appealing to a variety of stakeholders and citizens, the Klamath River Project DEIS provides a resource for considerations and relevant tradeoffs in large scale decommissioning projects.

Conclusion and Implications

Comment period is set to end on April 18, 2022. Thereafter, FERC will consider the comments received and issue a final environmental impact statement. The final Environmental Impact Statement is expected in September 2022.
(Tiffanie Ellis, Meredith Nikkel)

FERC REVISES POLICY STATEMENT ON NATURAL GAS FACILITIES CERTIFICATION TO BOLSTER CONSIDERATION OF GHG IMPACTS AND ENVIRONMENTAL JUSTICE

On February 18, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Updated Policy Statement on the certification of new interstate natural gas facilities (Updated Policy) and a Draft Policy Statement Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (GHG Policy). The Updated Policy clarifies FERC's framework in weighing a Project's economic benefits against its impacts on the environment and environmental justice communities when making a determination of public convenience and necessity. The GHG Policy directs FERC's assessment of the impacts of natural gas infrastructure projects on climate change in its reviews under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). This certification followed two Notices of Inquiry seeking comments from members of the public and stakeholders on revisions to the Policy. FERC recently declared this Updated Policy a draft and is seeking additional public comment.

Background

FERC issues certificates of public convenience and necessity for the construction and operation of facilities transporting natural gas in interstate commerce pursuant to Section 7 of the Natural Gas Act (NGA). (15 U.S.C. §717 *et seq.*) Section 7(e) of the NGA requires FERC to make a finding that the construction and operation of a proposed project "is or will be required by the present or future public convenience and necessity" before issuing a certificate to a qualified applicant.

In 1999, FERC issued a Policy Statement regarding issuance of public convenience and necessity stating its goals, which include to 1) "appropriately consider the enhancement of competitive transportation alternatives, the possibility of over building, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain"; 2) "provide appropriate incentives for the optimal level of construction and efficient customer choices"; and

3) "provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project." (1999 Policy Statement, 88 FERC at 61,737.)

Updated Policy Statement

In its Updated Policy, FERC maintains the same goals of the 1999 Policy Statement but it acknowledges the significant developments that have occurred since issuance of the 1999 Policy Statement that warrant revisions in the Updated Policy. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 2 (2022).) These developments include an increase in the available supply of gas from shale reserves due to development of domestic shale formations and new extraction technologies. This increased domestic supply has resulted in reduced prices and price volatility, and more proposals for natural gas transportation and export projects. The increase in domestic supply, however, has coincided with a concern from affected landowners and communities, Tribes, environmental organizations regarding the environmental impacts of project construction and operation, including impacts on climate change and environmental justice communities.

Federal Mandate to Focus on Environmental Justice and Equity

The Updated Policy also addresses the mandate for federal agencies to focus on environmental justice and equity arising from Executive Orders requiring agencies to identify and address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities of their actions.

Relevant Factors to Consider and Evidence

The 1999 Policy Statement set forth the policy to consider all relevant factors reflecting the need for the project, including, but not limited to precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 53.) However, in implementing the Updated Policy, FERC has relied almost exclusively on precedent agreements to establish project need. During the comment period, commentors argued that FERC should analyze additional factors, such as future markets, opportunity costs, federal and state public policies, and effects on competition. FERC agreed, finding that FERC should weigh other evidence in order to comply with the NGA and the APA. For instance, the Updated Policy includes applications to detail how the gas will ultimately be used and why the project is necessary to serve that use.

The Updated Policy also provides guidance on what type of evidence will be acceptable. Following the U.S. Court of Appeals for the District of Columbia's recent holding in *Environmental Defense Fund v. FERC* that "evidence of 'market need' is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement," under the Updated Policy, affiliate precedent agreements will be insufficient to demonstrate need.

Consideration of Adverse Effects

The Updated Policy Statement declares that FERC will consider adverse effects in its determination to consider whether to issue a certificate of public convenience and necessity. These interests include: 1) the interests of the applicant's existing customers; 2) the interests of existing pipelines and their captive customers; 3) environmental interests; and 4) the interests of landowners and surrounding communities, including environmental justice communities. The Policy grants the Commission authority to deny an application based on adverse impacts to any of these interests. FERC's necessary finding that the project will serve the public interest is based on a consideration of all the benefits of a proposal balanced against the adverse impacts, including economic and environmental impacts. Where the 1999 Policy directed FERC to consider the economic impacts of a project before consideration of the environmental impacts, the Updated Policy directs concurrent consideration of environmental and economic impacts.

Dissenting Commissioners

Commissioners Danly and Christie dissented to the Updated Policy arguing that the new requirements would put an undue burden on approvals for natural gas pipelines resulting in significant increases in costs for pipeline operators and customers. (*Id.* at Dissent.)

Greenhouse Gas Policy

FERC also simultaneously adopted a GHG Policy. The GHG Policy requires FERC to quantify a project's reasonably foreseeable GHG emissions including emissions from construction, operation, and the downstream combustion of natural gas when FERC is conducting environmental review under NEPA. (Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, PL21-3-000 (2022) ¶28.) In 2016, FERC began to estimate GHG emissions on a more inclusive scale, including downstream combustion and upstream production. FERC then halted this practice in 2018 and several federal court decisions ensued. The GHG Policy implements decisions from federal courts holding FERC should gather information on downstream uses to determine whether downstream GHG emissions are a reasonably foreseeable effect of the project. (*Id.* at ¶¶11-14, citing *Sierra Club v. FERC* (2017) 867 F.3d 1357; *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019).)

Congress is Briefed

On March 3, 2022, FERC commissioners appeared before the Senate Committee on Energy and Natural Resources on Thursday to discuss the Updated Policy. At the hearing, Senator Joe Manchin, Chairman of the Senate Energy and Natural Resources Committee and Senator John Barrasso expressed their opposition to the Updated Policy based on concerns that the Updated Policy will have on the nation's energy independence, jobs, and energy reliability and cost. Chairman Richard Glick and Commissioners Janes Danly, Allison Clements, Mark C. Christie, and William L. Philips gave testimony regarding the Updated Policy. Commissioners Danly and Christie expressed their opposition for the Updated Policy while Commissioners Glick, Clements, and Philips expressed their support.

Public Comment

On March 24, 2022, FERC designated the Updated Policy and the GHG Policy draft policy statements and is seeking further public comment. (178 FERC ¶ 61,197.) The Update Policy and GHG Policy will not apply to pending project applications or applications filed before the Commission issues any final guidance in these dockets. The deadline to submit comments is April 25.

Conclusion and Implications

While the Updated Policy and GHG Policy seek to create greater balance in the consideration of greenhouse gas emissions impacts and environmental justice when FERC weighs public convenience and necessity, they have the potential to make certification of new interstate natural gas facilities more inconsistent and potentially more unlikely. This shift in policy represents the on-going tug-of-war between the competing priorities of reducing greenhouse gas emissions and maintaining energy security.
(Natalie Kirkish, Darrin Gambelin)

U.S. BUREAU OF RECLAMATION DECLARES CVP INITIAL 2022 ALLOCATION OF ZERO PERCENT FOR IRRIGATION—CALIFORNIA DEPARTMENT OF WATER RESOURCES REDUCES SWP ALLOCATIONS TO FIVE PERCENT

In response to an historically dry end to the winter season and a seemingly unrelenting lack of precipitation, the U.S. Bureau of Reclamation (Bureau) recently announced initial allocations of zero percent for Central Valley Project (CVP) contractors for irrigation, and the California Department of Water Resources (DWR) slashed initial State Water Project (SWP) allocations from 15 percent down to 5 percent.

Background

California's precipitation and runoff tend to be concentrated during the winter months and in the north of the state, while much of the water use and need, particularly for agriculture, occurs during the summer and in the central and southern portion of the State. The federal Central Valley Project and California State Water Project are large water in-

frastructure systems that were designed to store and transport water to mitigate this mismatch between supply and demand. CVP and SWP water is delivered to water agencies who have longstanding contracts for a certain volume of water each year. Due to variability of annual water supply, only a percentage of the contracted allocation amounts is typically delivered each year. Initial allocations are calculated based upon the amount of precipitation in the wet first half of the water year, which begins October 1.

Record Low Precipitation in January and February 2022

January and February of 2022 saw the lowest precipitation on record in California. This was particularly concerning as it affected many of the typically wetter northern parts of the state. Despite strong precipitation in December 2021, the shortfall in January and February 2022— normally the wettest months of the year—bodes ill for the remainder of this water year, indicating that California is currently-headed for a third consecutive year of drought. As of this writing, precipitation in March was insufficient to make up for the dry start to 2022 or to bring rainfall and snowpack back to normal levels.

Central Valley Project Initial Allocations

The CVP, which is managed by the Bureau, announced its initial allocations on February 23, 2022. In addition to the low precipitation in early 2022, The Bureau noted that the December storms did not fall evenly across headwater areas and that Lake Shasta, a major CVP reservoir, received only minimal recharge from December precipitation. Furthermore, CVP reservoirs were already low at the start of the water year due to a dry 2021.

Consequently, the Bureau has announced that CVP 2022 initial allocations for irrigation contractors both north-of-Delta and south-of-Delta are zero percent of contracted supplies. Municipal and industrial (M&I) contractors north-of-Delta serviced from the Sacramento River will receive only water for public health and safety, while M&I contractors serviced directly from the Delta and those south-of-Delta will receive 25 percent. Friant Division contractors are allocated 15 percent of their Class 1 supply and zero percent of their Class 2 supply.

State Water Project Allocations Slashed

In December 2021, the California Department of Water Resources (DWR) announced an initial SWP allocation for health and safety water only, with no further deliveries, marking the first-ever SWP zero percent initial allocation. Previously, the lowest initial allocations were 5 percent in 2010 and 2014. After December rainfall, SWP allocations were raised to 15 percent; but, on March 18th, following the dry December and January, DWR slashed allocations to just 5 percent for almost all contractors. Following an analysis of precipitation through March, SWP allocations may be adjusted again. DWR typically announces its final allocations in April or May.

Conclusion and Implications

The extremely low Central Valley Project and State Water Project allocations will, of course, present challenges for California water users who rely on those supplies. Both entities may still update the percentages in their final allocations, but this currently seems unlikely as the "wet" season is rapidly drawing to a close. Typically, in a low water year, water users would increase groundwater pumping to offset shortage of surface supplies. However, that option has become less reliable, more expensive—or both—in many areas as a result of recently adopted Groundwater Sustainability Plans and related management actions imposed by Groundwater Sustainability Agencies. Consequently, some water users may find themselves increasingly "squeezed" if they are unable to pump enough groundwater to offset the impacts of SWP and CVP shortfalls.
(Jaclyn Kawagoe, Derek Hoffman)

CALIFORNIA DEPARTMENT OF WATER RESOURCES BEGINS PREPARATION OF ENVIRONMENTAL IMPACT REPORT FOR DROUGHT SALINITY BARRIER

On February 23, 2022, the California Department of Water Resources (DWR) published a Notice of Preparation of the Environmental Impact Report for the West False River Drought Salinity Barrier Project (Notice). As the "lead agency" under the California Environmental Quality Act (CEQA), DWR will prepare an Environmental Impact Report (EIR) to assess the potential environmental effects of the proposed project. The Notice is to solicit the views of interested persons, organizations, and agencies regarding the scope and content of the environmental information for the proposed project.

Background

DWR has constructed a drought salinity barrier in the West False River in the past. Most recently, in mid-2021, DWR constructed a temporary emergency drought barrier in the West False River in response to worsening drought conditions and Governor Newsom's Emergency Drought Proclamation. According to DWR, the barrier helps:

> . . .slow the movement of saltwater into the central Delta and prevent contamination of water supplies for Delta agriculture and municipal supplies for millions of Californians. (Department of Water Resources, *Construction Begins on Emergency Drought Barrier in Sacramento-San Joaquin Delta* (June 3, 2021) available at: https://water.ca.gov/News/News-Releases/2021/June-21/Emergency-Drought-Barrier-Construction-Delta)

DWR credits the temporary barrier's effectiveness during the 2012-2016 drought for "reducing the intrusion of salt water into the central and south Delta," as well as helping to "preserve fresh water supplies for future critical uses including drinking water and the environment." (Department of Water Resources, *Construction Begins on Emergency Drought Barrier in Sacramento-San Joaquin Delta* (June 3, 2021) available at: https://water.ca.gov/News/News-Releases/2021/June-21/Emergency-Drought-Barrier-Construction-Delta)

The Proposed Project

The proposed project consists of a temporary barrier and water quality monitoring stations. (Notice, at p. 1) The temporary barrier will be constructed in the West False River, approximately four-tenths of a mile east of the West False River's confluence with the San Joaquin River, within the Sacramento-San Joaquin River Delta. (*Id.*) DWR may install the temporary barrier:

> . . .up to two times between 2023 and 2032, including consecutive years, if drought conditions occur, for a period of up to 20 months. (*Id.*)

Concurrent with the next construction of the temporary barrier, DWR will install three new water quality monitoring stations in the Delta—one in Woodward Cut and two in Railroad Cut. (*Id.*) The water quality monitoring stations will be left in place after the barrier's removal, however. (*Id.* at p. 2)

The temporary barrier and water quality monitoring stations will be installed if DWR, in cooperation with other state and federal agencies, determines that drought conditions impact on State Water Project and Central Valley Project water storage such that the projected Delta outflow would be insufficient to control salinity intrusion in the Delta. (Notice, at p. 1) DWR believes the temporary barrier "would be an effective tool to protect the beneficial uses of the interior Sacramento-San Joaquin Delta water by reducing saltwater intrusion while preserving the use of critically needed reservoir water." (*Id.*) Indeed, the project's objective is to

> . . .minimize the impacts of salinity intrusion on the beneficial uses of water in the Delta, consistent with *The Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region: The Sacramento River Basin and the San Joaquin River Basin* (May 2018), during persistent drought conditions. (*Id.* at p. 2)

According to the Notice, the temporary barrier will be approximately 800 feet long, spanning the West False River from Jersey Island north to Bradford Island. (Notice, at p. 1) The temporary barrier will be constructed of approximately 84,000 cubic yards of embankment rock sourced from a commercially operated rock quarry in San Rafael, DWR's own Rio Vista stockpile in Solano County, or the Weber stockpile in San Joaquin County. (*Id.*)

If the drought conditions warrant leaving the temporary barrier in place for a subsequent year, DWR may cut a notch in the middle portion of the temporary barrier in January of the subsequent year to permit fish passage and vessel navigation through the West False River. (Notice, p. 1) The cut would then be filled as early as the first week of April. (*Id.*)

DWR anticipates some of the probable environmental effects to include:

- Decreased air quality during construction;
- Biological resources from potential effects to special-status species or their habitat, migratory fish species, and state or federally protected wetlands during construction and presence of the barrier in the West False River;
- Potential effects to archeological and historical sites and tribal cultural resources during construction;
- Hydrology and water quality from potential erosion, scour, siltation, and water quality effects during construction and presence of the barrier; and
- Recreation from presence of the barrier.

Conclusion and Implications

Pursuant to CEQA, the Department of Water Resources circulated the Notice among the responsible and trustee agencies. The responsible and trustee agencies must provide DWR with specific details regarding the scope, significant environmental issues, reasonable alternatives, and mitigation measures within the responsible or trustee agencies' area of statutory responsibility. DWR will consider these comments and measures in its Environmental Impact Report.

DWR circulated the notice for a 30-day period beginning Wednesday, February 23, 2022 and ending Friday, March 25, 2022, at which point written comments on the scope of the EIR were due. DWR will then consider all written comments received from interested persons, organizations, and agencies when preparing the forthcoming EIR.
(Nicolas Chapman, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Air Quality

•March 8, 2022 - The U.S. Environmental Protection Agency announced that Hilcorp Alaska has paid a $180,580 penalty for Clean Air Act violations at 35 of its Prudhoe Bay, Milne Point, and Kenai Peninsula facilities in Alaska. EPA found Hilcorp failed to make timely repairs when leaks of methane and volatile organic compounds were found, failed to conduct leak inspection at a new facility, and failed to accurately report on leak inspection and repair activities from 2018 through 2020. The oil and natural gas industry is the largest industrial source of methane and smog-forming volatile organic compounds. EPA requires the oil and gas industry to reduce fugitive emissions of methane and VOCs through regular inspections for leaks and prompt repair when leaks are discovered. Methane is a potent greenhouse gas. Some examples of the violations EPA found:

In Prudhoe Bay, the company took several months to conduct required repairs to multiple sources of fugitive emissions.

In its 2020 Annual Compliance Report Hilcorp stated that it failed to repair or replace 13 sources of fugitive emissions during scheduled shutdowns at its Greater Prudhoe Bay oil field.

•March 9, 2022 - Chevron Phillips Chemical Company LP has agreed to make upgrades and perform compliance measures estimated to cost $118 million to resolve allegations that it violated the Clean Air Act and state air pollution control laws at three petrochemical manufacturing facilities located in Cedar Bayou, Port Arthur, and Sweeney, Texas. Chevron Phillips will also pay a $3.4 million civil penalty. The settlement will eliminate thousands of tons of air pollution from flares. According to the complaint filed with a consent decree, the company failed to properly operate and monitor its industrial flares, which resulted in excess emissions of harmful air pollution at the three Texas facilities. The company regularly "oversteamed" the flares and failed to comply with other key operating constraints to ensure the volatile organic compounds (VOCs) and hazardous air pollutants (HAPs) contained in the gases routed to the flares are efficiently combusted. The settlement is expected to reduce emissions of ozone-forming VOCs by 1,528 tons per year and of toxic air pollutants, including benzene, by 158 tons per year. Chevron Phillips will take several steps to minimize the waste gas sent to its flares at each facility.

Civil Enforcement Actions and Settlements—Water Quality

•March 1, 2022 - EPA has issued its final permit decision obligating the General Electric Company to perform a cleanup of the Rest of River portion of the GE-Pittsfield/Housatonic River Site. The Revised Final Permit is a significant step towards reducing PCBs in and around the river and will reduce risk of human exposure. After a robust public comment process, EPA issued the Revised Final Permit, outlining the cleanup plan for the Rest of River in Massachusetts and Connecticut, on December 16, 2020. EPA notified the General Electric Company of the Region's final permit decision, and the permit became effective and fully enforceable. The Revised Final Permit requires GE to clean up contamination in river sediment, banks, and floodplain soil that pose unacceptable risks to human health and to the environment. GE will excavate PCB contamination from 45 acres of floodplain and 300 acres of river sediment, resulting in removal of over one-million cubic yards of PCB-contaminated material. The cleanup is estimated to cost $576 million and will take approximately two to three years for initial design activities and 13 years for implementation.

•March 16, 2022 - Austin Powder Company, owner and operator of the Red Diamond explosives manufacturing plant located near McArthur, Ohio, has agreed to implement significant upgrades to that facility's wastewater treatment operations to resolve numerous Clean Water Act violations. It will also pay a civil penalty of $2.3 million. The complaint, filed contemporaneously with the settlement, alleges that since 2013 the facility has had hundreds of discharges of pollutants in violation of the effluent limitations in its permits and failed to fully comply with an earlier EPA Administrative Order on Consent which sought to resolve these concerns. Under the proposed settlement, Austin Powder will invest approximately $3 million to improve two of its wastewater treatment plants, including implementing comprehensive operation and maintenance plans. The company has already eliminated discharges from four other on-site plants and under the consent decree will eliminate discharges from a fifth plant. These improvements will be completed on or before Dec. 31.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•March 4, 2022 - Northern Indiana Public Service Company (NIPSCO) will clean up soil contamination at individual residences within the Town of Pines Groundwater Plume Superfund site in Porter County, Indiana, at an estimated cost of $11.8 million to resolve federal and state Superfund liability. The complaint, filed simultaneously with the consent decree, alleges that the company is liable for the cleanup of coal ash from its power generation facility that it distributed as landscaping fill in the Town of Pines and its vicinity. The soils contaminated by coal ash contain hazardous substances including arsenic, thallium and lead. The consent decree requires NIPSCO to identify residential soil contamination above clean up levels from its disposal of coal ash, excavate the contaminated soils, and transport excavated contaminated soil to a licensed waste disposal facility. NIPSCO is also required to restore excavated and monitor residential drinking water wells, groundwater monitoring wells, surface water and sediments to ensure that the contamination has not migrated to those locations. The company will also reimburse EPA a large percentage of its past costs and pay all future costs incurred by EPA and the State of Indiana in overseeing the cleanup.

•March 10, 2022—EPA settled with Allied BioScience, Inc. (Allied BioScience) over alleged violations of federal pesticide regulations with the company's SurfaceWise2 product, a residual antimicrobial surface coating. EPA investigations found the company was marketing, selling, and distributing SurfaceWise2 in ways that were inconsistent with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), EPA's regulations, and the terms and conditions of its emergency exemption authorizations, specifically with regard to the product's claims about SARS-CoV-2 viruses. Under the settlement, Allied BioScience agreed to a civil penalty of $253,032, based on the company's financial ability. EPA previously issued a Stop Sale, Use or Removal Order (SSURO) to Allied BioScience for SurfaceWise2. The SSURO issued to Allied BioScience required the company to immediately stop selling and distributing SurfaceWise2. Recently, EPA modified the SSURO issued to Allied BioScience to allow for the product to be distributed outside the United States bearing revised export labeling and to allow returns of the product to Allied Bioscience.

•March 16, 2022—EPA and the Department of Justice announced a proposed settlement with the North Slope Borough of Alaska to resolve federal hazardous waste and oil spill violations. The settlement requires the Borough to take comprehensive actions and make infrastructure investments to comply with solid and hazardous waste management rules and oil spill prevention rules. The Borough will also hire an independent third-party auditor to ensure that the compliance requirements in the settlement are successfully implemented and pay a civil penalty of $6.5 million. The alleged RCRA violations include the Borough's unpermitted storage of hazardous waste; failure to identify and characterize hazardous waste; unauthorized transport of hazardous waste; shipment of hazardous waste without proper manifesting and land disposal restriction notices; non-compliant management of universal wastes; and failure to properly label used oil containers. To resolve the alleged violations and come into compliance with federal requirements, the Borough has agreed to close all unpermitted hazardous waste storage facilities; develop a comprehensive waste management plan to minimize generation of and ensure proper tracking and management of solid and hazardous waste; build

or retrofit a permitted hazardous waste storage facility; revise its CWA Spill Prevention, Control, and Countermeasure Plan; install adequate secondary containment around oil storage containers; and develop an integrity testing program for oil storage containers that complies with applicable industry standards.

Indictments, Sanctions, and Sentencing

•March 15, 2022 - Louisiana based company Power Performance Enterprises, Inc. (PPEI) and its President and owner, Kory B. Willis, pleaded guilty to criminal charges in federal court in Sacramento, California. Both defendants pleaded guilty to conspiracy to violate the Clean Air Act and to violating the Clean Air Act by tampering with the monitoring devices of emissions control systems of diesel trucks. In addition to the criminal charges, the United States also filed a civil complaint against PPEI and Willis in federal court in the Western District of Louisiana, alleging violations of the Clean Air Act's prohibition against the sale or manufacture of devices that bypass, defeat, or render inoperative emissions controls. Under the criminal plea agreements and a proposed civil consent decree, PPEI and Willis agreed to pay a total of $3.1 million in criminal fines and civil penalties. Under the proposed civil settlement, defendants PPEI and Willis will pay $1,550,000 in civil penalties and agree not to manufacture, sell, or install any device that bypasses, defeats, or renders inoperative motor vehicle emissions controls. The defendants will not sell or transfer the intellectual property associated with these products, and will destroy illegal products still in inventory, cease warranty support for previously sold products, revise marketing materials, notify customers and dealers of the law and the settlement, and train employees and contractors. According to civil court documents, Willis and PPEI halted sales of specified delete devices in the fall of 2019 following enforcement activity by EPA.

•March 11, 2022—The DOJ and the U.S. Attorney's Office for the Middle District of Pennsylvania announced that Ty Allen Barnett, of Dover, Pennsylvania, entered a plea of guilty to the improper handling and removing of regulated asbestos containing material as required by federal law. A ten-count indictment filed in January 2020, charged Lobar Inc., First Capital Insulation, Inc., Francis Richard Yingling Jr., Dennis Lee Charles Jr., M&J Excavation Inc., John August Sidari Jr., and Ty Allen Barnett, with various violations of the federal Clean Air Act arising from disturbing and removing asbestos in violation of the National Emission Standards for Hazardous Air Pollutants regulations. Lobar Inc. pleaded guilty on Feb. 9. The remaining defendants have pleaded not guilty and are currently scheduled for trial. The criminal charge is the result of Barnett's activity as the project supervisor for the asbestos abatement contractor, First Capital Insulation Inc., on the Berwick Area School District project in Berwick, Pennsylvania. Prior to purchasing the mill in January 2014, the Berwick Area School District obtained an environmental assessment report that identified hazardous substances, including asbestos, located in the old facility. The existence of asbestos was confirmed by an environmental consultant. The findings of both assessments were shared with Lobar, and its subcontractors responsible for asbestos removal and demolition.

•March 14, 2022 - A California man pleaded guilty to renovating two apartment complexes in violation of federal Clean Air Act regulations intended to prevent human exposure to toxic airborne asbestos fibers. Khalili was indicted by a grand jury sitting in the District of Nevada in September 2019, in connection with asbestos-related Clean Air Act violations at a Las Vegas apartment complex. The grand jury later returned a superseding indictment against Khalili in July 2021, in connection with new Clean Air Act asbestos violations at a second apartment complex, which Khalili now admits he committed while on pretrial release for the first set of charges. As part of his guilty plea, Khalili acknowledged that, on behalf of his company Las Vegas Apartments LLC, he oversaw renovation activities at both apartment complexes. He further admitted that he was aware of asbestos-containing materials at both buildings, and that he hired untrained individuals to tear out those materials without following asbestos work practice standards prescribed by the Clean Air Act. Those work practice standards require that asbestos-containing materials be safely removed prior to general renovation activity taking place.
(Andre Monette)

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RECENT FEDERAL DECISIONS

FIFTH CIRCUIT FINDS BIDEN ADMINISTRATION'S POLICY ON ASSESSING GREENHOUSE GAS COSTS IN RULEMAKING SHOULD GO FORWARD PENDING APPEAL

Louisiana v. Biden, ___F.4th___, Case No. 22-30087 (5th Cir. Mar. 16, 2022).

The Biden administration's policy on federal agency consideration of the impacts of greenhouse gas (GHG) emissions when carrying out cost-benefit analyses of regulations may be implemented pending resolution of an appeal in a challenge by state's alleging an impermissible increase in regulatory burdens. The Fifth Circuit Court of Appeals stayed an injunction prohibiting implementation of the Biden policy on the basis that the states are unlikely to succeed in establishing standing for their claims. The court also indicated its discomfort with the overbreadth of the injunction, which affirmatively required agencies to implement the Trump administration's policy for consideration of greenhouse gas impacts.

Background

Consideration of the costs and benefits of regulations has been part of federal agencies' deliberations since the Nixon administration, and was mandated by President's Clinton's 1993 Executive Order 12866, which requires "the prepublication review process for economically significant regulations." Subsequent administrations have retained Executive Order 12866 "and strengthened it with additional directives or guidelines for regulatory analysis." The Office of Management and Budget issued Circulate A-4 in 2003 "to provide guidance to agencies on how to conduct the cost-benefit analysis implemented by EO 12866," although compliance with Circulate A-4 is not required.

In 2009, President Obama established the Interagency Working Group (IWG) "to develop a method for quantifying the costs and effects of [greenhouse gas] emissions." The intent was "[t]o encourage consistency in determining" "the Social Cost of Greenhouse Gases (SC-GHG)" for use by federal agencies when conducting cost-benefit analyses of proposed regulations. Agencies routinely include in their cost-benefit analyses the impact of GHG emissions, including by "quantif[ying] into dollar amounts per ton of gas emitted" the impacts of GHG emissions "on various factors like health, agriculture, and sea levels," expressed as the SC-GHG. The IWG issued its method for calculating the SC-GHG in 2010 and regulatory updated them by issuing estimates of SC-GHG up to and including in 2016.

President Trump's 2017 Executive Order 13783 dissolved the IWG and withdrew its method for quantifying the SC-GHG. EO 13783 nonetheless still envisioned that agencies would:

> . . .monetize the value of changes in greenhouse gas emissions resulting from regulations. . .[and that such calculations]. . .would be consistent with Circular A-4.

On taking office in January 2021, President Biden issued Executive Order 13990 reinstating the IWG, directing it to develop new estimates of SC-GHG for use by agencies, and to within 30 days to develop Interim Estimates that agencies would be required to use "when they conduct cost-benefit analyses for regulatory or other agency actions." In February 2021 the IWG issued Interim Estimates that were the 2016 estimates of SC-GHG, adjusted for inflation.

Ten states (Louisiana, Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia and Wyoming) sued in April 2021, challenging the Interim Estimates, and in February 2022 obtained an injunction from the district court enjoining federal agencies from using the Interim Estimates.

The Fifth Circuit's Decision

The government defendants sought a stay of the injunction pending consideration of their appeal. The Circuit Court's analysis focused on the likelihood that

the plaintiff states would prevail on the merits, specifically whether the states "made a strong showing that [they are] likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Article III Standing and Injury

Specifically, the court concluded that the states lack Article III standing because of their inability to demonstrate their claimed injury—"'increased regulatory burdens' that *may* result from the consideration of SC-GHG, and the Interim Estimates specifically"—meets the standard for an "injury in fact" set forth in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992):

> . . .an invasion of a legally protected interest which is (a) concrete and particularized … and (b) actual or imminent, not conjectural or hypothetical.

The court observed that "[t]he Interim Estimates on their own do nothing to the Plaintiff States," as their claims:

> . . .are premised *solely* on the broad use of the Interim Estimates. They do not challenge any specific regulation or other agency action.

Those claims "therefore amount to a generalized grievance of how the current administration is considering SC-GHG," the antithesis of a "concrete and particularized" injury. Per *Lujan*, a "challenge [to] a more generalized level of Government action" rather than to a "specifically identifiable Government violations of law" is "rarely if ever appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568.

Causation and Redressability

Additionally, the court found that the states are unlikely to "meet their burden on causation and redressability." The gravamen of their complaint is that application of the Interim Estimates will impose "increased regulatory burdens." But those burdens:

> . . .appear untraceable because agencies consider a number of other factors in determining when, what, and how to regulate or take agency action (and Plaintiff states do not challenge a *specific* regulation or action).

Here, the Court of Appeals cited *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-413 (2013) for the proposition that:

> . . .redressability was absent because there was a number of other methods to inflict the same injury which were not challenged in the case.

Irreparable Harm

Lastly, the broad scope of the District Court's injunction supported the Court of Appeals' finding that in the absence of a stay the defendants would be irreparably harmed. The injunction not only prohibited use of the Interim Estimates:

> . . .halt[ing] the President's directive to agencies in how to make agency decisions, *before* they even make those decisions. It also orders agencies to *comply* with a prior administration's internal guidance document that embodies a certain approach to regulatory analysis, even though that document was not mandated by any regulation or statue in the first place. The preliminary injunction sweeps broadly and prohibits reliance on § 5 of EO 13990, which creates the IWG, a group created to advise the President on policy questions in addition to creating the Interim Estimates. It is unclear how the Plaintiff States' qualms with the Interim Estimates justify halting the President's IWG. All of this effectively stops or delays agencies in considering SC-GHG in the manner the current administration has prioritized within the bounds of applicable law. The preliminary injunction's directive for the current administration to comply with prior administrations' policies on regulatory analysis absent a specific agency action to review also outside the authority of the federal courts.

Lastly, the court prioritized "the maintenance of the status quo," *i.e.*, continued use of the Interim Estimates that have been in place since February 2021. As "the claimed injury, increased regulatory burden, has yet to occur," the plaintiff states have yet to be harmed and they will not be harmed until a regulation:

> . . .is promulgated from the *actual* use of the Interim Estimates. . .[and the Court]. . .discern[ed] no obstacle to prevent the Plaintiff States from challenging a specific agency action in the manner provided by the APA.

Conclusion and Implications

In addition to the defects in the plaintiff states' asserted standing, the Court of Appeals was clearly disturbed by the overbreadth of the injunction requested by the states and granted by the district court. Rather than confine itself to enjoining use the Interim Estimates, the trial court—presumably at the plaintiffs' invitation—commanded federal agencies to implement the Trump administration's non-mandatory method for considering the SC-GHG. This overreach clearly reinforced the court's comfort in issuing the stay.
(Deborah Quick)

DISTRICT COURT REJECTS PRELIMINARY INJUNCTION AGAINST HYDROELECTRIC DAMS UNDER THE FEDERAL ENDANGERED SPECIES ACT

Atlantic Salmon Federation U.S., et al. v. Merimil Limited Partnership, et al.,
___F.Supp.4th___, Case No. 21-CV-00257-JDL (D. Me. Feb. 24, 2022).

The U.S. District Court for the District of Maine recently denied a request for preliminary injunction by conservation groups seeking to require operators of hydroelectric dams on Maine's Kennebec River to make seasonal changes to dam operations to reduce unauthorized take of endangered Atlantic salmon.

Factual and Procedural Background

The National Marine Fisheries Service (NMFS) has designated as endangered the Gulf of Maine Distinct Population Segment of salmon (Maine Salmon) under the federal Endangered Species Act. The Endangered Species Act makes it unlawful to "take" species or distinct population segments of a species that are listed as endangered without authorization, such as by harming the protected fish or wildlife. Harm is defined as:

> . . .an act which actually kills or injures fish or wildlife. . .[and]. . .may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Conservation groups, Atlantic Salmon Federation U.S., Conservation Law Foundation, Maine Rivers, and the Natural Resources Council of Maine, commenced a citizen suit against the licensees of four hydroelectric dams on the Kennebec River, alleging unauthorized take of endangered Maine Salmon by the dam operators and licensees: Merimil Limited Partnership, Hydro-Kennebec LLC, Brookfield White Pine Hydro LLC, Brookfield Power US Asset Management LLC, and Brookfield Renewable US (Dam Operators). Plaintiffs alleged that the Dam Operators' incidental take authorization had expired such that the continued take of juvenile and adult salmon migrating upstream and downstream on the Kennebec River—and passing through the Lockwood, Hydro-Kennebec, Shawmut, and Weston hydroelectric facilities—violated the Endangered Species Act.

Plaintiffs requested a preliminary injunction mandating certain changes to dam operations for the purpose of increasing the number of Maine Salmon surviving migration on the Kennebec River. Plaintiffs requested that Dam Operators be required to increase water flows at certain facilities during particular seasons for Maine Salmon migration by running gates and spillways at maximum discharge and turning certain turbines off at specified intervals to allow for safe passage. After evaluating the parties' competing evidence, the court denied the plaintiffs' request for preliminary injunction principally because of insufficient evidence showing how the proposed operations changes would benefit Maine Salmon as an endangered population.

The District Court's Decision

In deciding whether to grant the plaintiffs' requested preliminary injunction to stop the unlawful taking of endangered Maine Salmon, the District Court considered the following four elements: 1) likelihood of success on the merits; 2) irreparable harm in the absence of a preliminary injunction; 3) that the balance of equities tips in favor of the requester; and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

First, the court evaluated the plaintiffs' likelihood of success on a theory of unlawful harm under the Endangered Species Act. In doing so, the court emphasized the need for evidence showing not just a probability of harm but actual injury to the endangered species or population segment. The court analyzed expert testimony and concluded there was sufficient evidence that the hydroelectric dams caused actual harm, and not just a probability of harm. Although the parties' experts reached different conclusions as to the precise mortality rate of Maine Salmon passing through each dam, the court found that the hydroelectric dams caused actual harm to Maine Salmon because even Dam Operators' expert concluded as many as 17 percent of juvenile salmon some adult salmon did not survive passage through the dams. Based on this evidence of mortality and the expiration of Dam Operators' incidental take authorization, the court held that the plaintiffs were likely to succeed on their claim that Dam Operators violated the Endangered Species Act by taking endangered Maine Salmon without authorization.

Irreparable Harm

Next, the court considered whether there would be irreparable harm in the absence of a preliminary injunction. The court applied the rule that irreparable harm is not synonymous with harm to an individual and is something more than negligible harm to the species or population segment as a whole. In turn, the court considered whether the proposed injunction would prevent irreparable harm to Maine Salmon as an endangered population segment. The court acknowledged the plaintiffs presented some evidence showing that modifying dam operations would reduce the unauthorized take of Maine Salmon passing through the dams, *i.e.* would reduce harm to individuals within the Maine Salmon population. But the court critiqued the plaintiffs' evidence as lacking specificity about how a reduction in take at the four dams would provide a benefit to Maine Salmon as a whole, including data and a rationale supporting each expert's interpretation of the data. Additionally, the court found the evidence insufficient to establish the efficacy of the proposed operational changes.

Balancing of Equites and the Public Interest

Finally, the court considered the third and fourth factors: the balancing of equities and the public interest. The court observed that due to the very enactment of the Endangered Species Act, the balance of equities and public interest will often weigh heavily in favor of an injunction protecting a listed endangered species. Despite this observation, the court determined that the evidence was insufficient to support a conclusion that the preliminary injunction would benefit the public interest. The court reasoned that because it could not determine that the preliminary injunction would benefit Maine Salmon as a whole for the purpose of the irreparable harm inquiry, it similarly could not conclude without speculation that the injunction would be in the public interest.

Conclusion and Implications

The court denied the plaintiffs' request for preliminary injunction. Although the court evaluated four criteria in reaching this decision, the dispositive issue common to several of the criteria was the lack of detailed evidence showing the proposed changes to dam operations would effectively prevent irreparable harm to Maine Salmon as a whole population segment.

This case highlights the importance of presenting detailed and specific expert testimony on the population-level impacts of proposed injunctive relief in a citizen suit under the Endangered Species Act. Courts may not view the particular harm or cause of mortality to an individual member of the species or population as identical to the cumulative harm to the endangered species or population as a whole. The court's ruling is available online at: https://casetext.com/case/atl-salmon-fedn-us-v-merimil-ltd-pship?q=1:21-CV-00257&PHONE_NUMBER_GROUP=P&sort=relevance&p=1&type=case
(Megan Beshai, Rebecca Andrews)

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DISTRICT COURT UPHOLDS EPA'S 'REASONABLE AVAILABILITY' ANALYSIS IN THE ESTABLISHMENT OF A CLEAN WATER ACT 'NO DISCHARGE ZONE'

American Waterways Operators v. Regan,
___F.Supp.4th___, Case No. 18-CV-2933 (APM) (D. D.C. Feb. 14, 2022).

The U.S. District Court for the District of Columbia recently upheld a U.S. Environmental Protection Agency (EPA) final determination under the federal Clean Water Act (CWA) against a facial challenge by petitioner trade association. EPA made a final determination under the CWA that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available in Puget Sound, such that the State of Washington could establish Puget Sound as a no-discharge zone (NDZ).

Factual and Procedural Background

In 2016, the State of Washington started designating the Puget Sound as a "no-discharge zone" under the Clean Water Act, which would prohibit commercial and recreational vessels from discharging their sewage into the Puget Sound. As part of the designation, Washington petitioned EPA to make a determination as to the reasonable availability of adequate sewage-removal and sewage-treatment facilities in the Puget Sound. In 2017, EPA made the determination, allowing the Puget Sound NDZ to go into force.

The American Waterways Operators (AWO) challenged EPA's determination under the Administrative Procedure Act (APA). EPA voluntarily requested remand of its determination, and the court ordered EPA to redo its reasonable-availability determination as to certain issues, including considering compliance costs and assessing the reasonable availability of adequate treatment facilities. On remand, EPA requested information from plaintiffs and intervenors regarding average annual operating costs for plaintiff's member vessels in Puget Sound, pumpout locations and state regulation of pumpout facilities, and capacity of treatment facilities. Based on this new information and the prior record, EPA reaffirmed its reasonable-availability determination and concluded that Puget Sound has ample capacity to treat all of its vessel sewage, such that adequate treatment facilities are reasonably available in Puget Sound.

AWO again challenged EPA's determination under the APA, claiming EPA ignored retrofit costs, arbitrarily concluded the costs associated with using pumpout facilities were reasonable, and failed to provide any reasoned explanation as to its conclusions regarding the reasonable availability. Plaintiff further argued that EPA violated the court's prior order which required EPA to consider "all relevant factors," including the costs of accessing adequate facilities, which plaintiffs believed to include capital and upfront costs.

Plaintiffs filed a motion to enforce the first summary judgment order and a second motion for summary judgment, and EPA and intervenors filed cross-motions for summary judgment.

The District Court's Decision

The Motion to Enforce

AWO raised three arguments that EPA violated the court's prior order when EPA did not consider retrofit costs: first, the omission was directly contrary to the order; second, EPA's actions on remand violated the law-of-the-case doctrine and the rule of mandate; and third, waiver and estoppel doctrines preclude an argument that EPA did not need to consider retrofit costs.

The court first considered and rejected plaintiff's argument that EPA's failure to consider retrofit costs was directly contrary to the order. The court held that EPA did not violate the order because the order did not specify which costs the agency was required to consider—it only required EPA to consider costs relevant to reasonable availability of adequate removal and treatment facilities. The court stated that EPA was only required to consider costs relevant to the reasonable availability of disposal and treatment facilities, and not the costs of creating an NDZ as a whole. The court determined the terms "reasonably available" and "relevant" provided EPA with flex-

ibility to determine which costs are relevant in the context of its determination.

Second, the court held that, the law-of-the-case doctrine and the rule of mandate did not did not require EPA to consider retrofit costs, because the prior order did address whether EPA had to consider these costs. The order directed EPA to assess relevant costs but left it to EPA to determine which costs were relevant.

Third, the court held waiver and judicial estoppel did not preclude EPA from making an argument regarding retrofit costs during the second summary judgment proceedings. The court determined EPA's request for remand in the original proceedings did not constitute a waiver of any arguments in the second summary judgment proceedings. Treating a request for remand as a waiver would force agencies in the future to raise or otherwise risk conceding merits arguments when seeking remand.

Summary Judgment

In their second motion for summary judgment, plaintiffs asked the court to find that: 1) EPA's decision not to retrofit costs was based on an unreasonable interpretation of the CWA and violated the APA; 2) the cost analysis EPA conducted was arbitrary and capricious; and 3) EPA's reasonable-availability determination as to treatment facilities lacked reasoned decision-making. The court disagreed with each of the plaintiff's arguments.

Retrofit Costs

The court determined EPA was not required to consider retrofit costs when making a reasonable availability determination. The court found that "availability," as used in the CWA, centers on whether attributes of the facilities themselves make them accessible or usable, not whether the user has the ability to use the facilities. The court concluded that retrofit costs are not attributable to the reasonable availability of treatment and disposal facilities, and thus not among the costs EPA must consider. The court found that although some vessels would need to incur retrofit costs to install tanks to hold sewage for transport to treatment and disposal facilities, these costs did not stem from the particular attributes of Puget Sound's pumpout facilities. Thus, while a state may consider such costs when establishing an NDZ, the court held that these costs were not relevant to EPA in determining whether there are reasonably available disposal and treatment facilities to service those retrofitted vessels.

EPA's Cost Analysis

Plaintiff argued that EPA's cost evaluation was flawed because it: 1) did not consider how pumpout costs would affect vessels and operators, 2) reached conclusions contradicted by the evidence, and 3) relied on faulty evidence. The court disagreed, holding that EPA's consideration of costs and its explanation of its reasoning were adequate.

The court noted that standard for such review of EPA's "reasonably available" analysis is deferential to the agency and determined EPA's consideration of costs and reasoning were adequate. Here, EPA found the relevant costs for determining facilities' reasonable availability were: use costs, pumpout time costs, travel costs, and wait-time costs. EPA compared these costs to vessel revenues, and concluded that pumpout costs constituted a small fraction of vessel revenues such that pumpout facilities were reasonably available. The court found it was reasonable for EPA to construct a methodology that assessed how facilities' availability affected the cost structure of vessels doing business in the Puget Sound overall, and it was not required to conduct a vessel-by-vessel analysis of their ability to absorb pumpout costs based on their actual margins. The court determined the record as a whole indicated that vessels can afford pumpout costs, and that while an incremental cost can be a small percentage of overall costs while still causing a vessel's margins to diminish past the point of viability, the record did not demonstrate that to be true in this instance.

The court next considered and rejected plaintiff's arguments, which claimed the publicly available revenue data EPA relied on was inaccurate, and that it was improper for EPA to rely estimates in the data rather than more detailed findings. The court noted that EPA invited stakeholders to submit information relevant to its consideration of costs on remand and that plaintiff had provided no evidence the publicly available revenue data was unreliable or inaccurate. The court then held that EPA's determination was not unreasonable on the basis of the data's level of specificity or reliance on public records for revenue estimates, and that its reliance on the data was not

improper as imperfection alone in a dataset relied on by an agency does not amount to arbitrary decision-making.

EPA's Analysis of Treatment Facilities

Finally, the court considered and rejected plaintiff's argument that EPA failed to engage in reasoned decisionmaking on the topic of the reasonable availability of sewage treatment facilities. The court noted that perfect availability of adequate treatment facilities is not required - only reasonable availability – and that EPA's determination considered the quantity of treatment facilities and their capacity, along with the frequency and impacts of overflows on treatment capacity, and explained how it analyzed those factors.

Conclusion and Implications

This case affirms that EPA must consider costs relevant to the reasonable availability of disposal and treatment facilities when making a determination on a state's application for an NDZ, but qualifies it by providing that EPA need not consider the costs of creating an NDZ as a whole—only those that are attributable to the reasonable availability of treatment and disposal facilities. This is an important distinction, as it affirms EPA's discretion to determine which costs are relevant and the methodology for accounting for those costs, such that EPA is not required to consider costs which will directly arise from the establishment of an NDZ, such as retrofit costs, but which have no bearing on the accessibility of facilities. The court's lengthy opinion is available online at: https://casetext.com/case/the-am-waterways-operators-v-regan.
(David Lloyd, Rebecca Andrews)

DISTRICT COURT FINDS CLEAN WATER ACT'S PARTIAL WAIVER OF SOVEREIGN IMMUNITY DID NOT IMPLIEDLY REPEAL DISTRICT COURT'S JURISDICTION OVER ENFORCEMENT ACTIONS

United States v. Bayley, ___F.Supp.4th___, Case No. 3:20-cv-05867-DGE (W.D. Wash. Mar. 14, 2022).

The U.S. District Court for the Western District of Washington State has held that by enacting a partial waiver of sovereign immunity as an amendment to the federal Clean Water Act (CWA), Congress did not impliedly repeal the general jurisdictional statute that allows the Department of Justice to bring enforcement actions in federal District Court. That partial waiver also did not require the Department of Justice to participate in local permitting procedures in order to establish standing to bring a Clean Water Act § 404 enforcement action on the basis of the permitted activity.

Background

Philip Bayley obtained a permit from Mason County, Washington, for a "bulkhead construction project," but neglected to obtain a Section 404 permit pursuant to the Clean Water Act. The Department of Justice pursued an enforcement action against Bayley in District Court. Bayley sought to have the enforcement action dismissed on the basis, *inter alia*, that the federal government lacks jurisdiction to bring an enforcement action in District Court under the Act, and when dismissal was denied sought reconsideration of the jurisdictional issue.

Enforcement Actions by the DOJ

When it brings enforcement actions against private parties under the Clean Water Act, the Department of Justice relies on 28 U.S.C. § 1345 to establish jurisdiction in federal District court:

> Except as otherwise provided by Act of Congress, the District Courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

When enforcement is sought against a federal agency, though, reliance on this generally-applicable

jurisdictional provision runs up against the doctrine of sovereign immunity, which provides that:

> . . .where Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free from regulation. *Hancock v. Train*, 426 U.S. 167, 179 (1979).

Thus, in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 227 (1976), the U.S. Supreme Court:

> . . .held that federal facilities were not subject to the permitting requirements under the Federal Water Pollution Control Act Amendments of 1972.

Congress promptly amended the Clean Water Act to add 33 U.S.C. § 1323(a), entitled "Compliance with pollution control requirements by Federal entities":

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution ... to the same extent as any nongovernmental entity[.]

Section 1323(a) acts as a limited waiver of sovereign immunity, subjecting federal agencies to enforcement for violations of the Clean Water Act, whether the act is being implemented by federal, state or local agencies.

The District Court's Decision

Argument of 'Implied' Repeal of 28 U.S.C. Section 1345's Conferral of Jurisdiction

Bayley argued that by requiring federal agencies to "adhere" to state and local requirements, § 1323(a) "impliedly" repeals 28 U.S.C. § 1345's conferral of jurisdiction over enforcement action on federal District Court. Citing *United States v. Com. of Puerto Rico*, 721 F.2d 832, 840 (1st Cir. 1983), the District Court rejected this argument.

Argument of DOJ's 'Assumption of Jurisdiction' by Alleging Discharges in WOTUS

The court further rejected Bayley's related argument that the Department of Justice:

> . . .assumed jurisdiction over [Bayley's] private property by alleging that the discharges at issue occurred in the waters of the United States [WOTUS] and because the U.S. Army Corps of Engineers issued a stop work order to [Bayley].

This argument was made apparently in support of an argument that the Department of Justice was required to participate in the local Mason County permitting process and:

> Plaintiff to have objected to Mason County's determination that Mr. Bayley's proposed bulkhead repair did not have a probable significant adverse impact on the environment.

The court held that § 1323(a) or any other provision in the CWA "impose[s] limits or contingencies on [the Department of Justice's] standing to bring an action against" Bayley in federal District Court.

Conclusion and Implications

Congress' dedication to cooperative federalism resulted in the Clean Water Act complex architecture by which significant implementation responsibilities are devolved to state, regional and local authorities. Section 1323(a) preserved the integrity of this system even as applied to federal agencies. However, it did not displace the generally-applicable grant of jurisdiction to federal District Courts to hear enforcement actions brought by the federal government. (Deborah Quick)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL UPHOLDS ENVIRONMENTAL ANALYSIS FOR WATER BANK AUTHORITY'S RECHARGE PROJECT

Buena Vista Water Storage District v. Kern Water Bank,
___Cal.App.5th___, Case No. B309764 (2nd Dist. Feb. 23, 2022).

In a decision filed on February 23, and ordered published on March 22, 2022, California's Second District Court of Appeal reversed a trial court decision setting aside the Kern Water Bank Authority's (KWBA) Environmental Impact Report (EIR) and approval of a project to divert remaining water from the Kern River in unusually wet years towards its Kern Water Bank (KWB). The decision, which upheld the KWBA's EIR and reinstated its approval of the project, includes a discussion of the adequacy of the EIR's project description, discussion of baseline conditions, and environmental impact analysis.

Factual and Procedural Background

The Kern River begins in the southern Sierra Nevada and flows southwest to the San Joaquin Valley. The upper segment of the river flows into the Lake Isabella Reservoir and Dam, which is used as a storage and regulation reservoir by the U.S. Army Corps of Engineers (Corps) and Kern River rights holders. The Kern River Watermaster manages water stored in the Isabella Reservoir and directs releases from it for water control purposes or to satisfy needs of Kern River water rights holders.

The Kern River is typically dry when it runs through Bakersfield but in some wet years flows through Bakersfield before reaching a physical structure named the "Intertie" through which flood waters are diverted to the California Aqueduct. Under California's appropriative water rights model, water rights to the Kern River are allocated into three groups, first point rights, second point rights, and third point rights. First and second point water rights holders receive water rights allocations on a daily basis, and any water not stored or diverted by first or second point rights holders belongs to lower rights holders. Typically, lower rights holders only receive water allocations in wet years. The City of Bakersfield and Kern Delta Water District have first point rights, petitioner Buena Vista Water Storage District has second point rights, and the Kern County water agency holds lower river rights.

In 2010, the State Water Resources Control Board ordered the Kern River's previous "fully appropriated stream" designation be removed based on evidence that some unappropriated water, that exceeded water rights holders' claims, was available in certain wet years, allowing for new appropriation applications to be processed.

The Kern Water Bank Authority Conservation and Storage Project was designed to divert up to 500,000 acre-feet-per-year from the Kern River for recharge, storage, and later recovery through existing diversion works to recharge the KWB. The KWBA acted as the lead agency, and prepared an EIR to evaluate environmental impacts of the Project. The EIR addressed appropriation of high flow Kern River water that is only available in wet years and after the rights of senior Kern River water right holders have been met. The EIR evaluated various environmental impacts, including impacts on hydrology and groundwater resources, and used the environmental settings from 1995 to February 2012 as baseline conditions. The EIR further discussed the hydrological impacts that would occur if the project was implemented.

The EIR noted that the project would only divert available Kern River water that cannot be used or stored by existing water rights holders and would not divert surplus flows in normal or dry years. Thus, the EIR concluded that the project would not have a significant impact on available water supply.

The EIR also discussed the project's impacts on groundwater and found that such impacts would be less than significant because the project would only

increase water available for recharge and storage and not change recovery operations in dry years and would not result in significant impacts on groundwater recharge or local groundwater elevations.

Petitioner Buena Vista Water Storage District filed an action for writ of mandate seeking to set aside approval of the project and the related EIR. The trial court granted the writ, finding the EIR inadequate. Specifically the trial court found that: 1) the definitions of project water and existing water rights were inadequate because they were "inaccurate, unstable, and indefinite," 2) the baseline analysis was inadequate because "it fail[ed] to include a full and complete analysis, including quantification of competing existing rights to Kern River water," and 3) the analysis of environmental impacts with respect to potentially significant impacts on senior rights holders and on groundwater during long-term recovery operations.

The Court of Appeal's Decision

On appeal KWBA contended: 1) the project descriptions of project water and existing rights complied with California Environmental Quality Act (CEQA), 2) a complete quantification of existing Kern River water rights was not required, and 3) the EIR properly evaluated the environmental impacts of long-term recovery operations on existing rights and groundwater levels. The appellate court agreed.

The Project Description

The court began by noting that the KWBA's project description was adequate. Here, the project description adequately and consistently described the project water as "high flow Kern River Water" which would only be available under relatively wet hydrologic conditions and after senior water rights holders rights had been met. Even though the EIR described in different words the conditions under which project water had historically flowed, these different descriptions still adequately described project water.

The Baseline / Environmental Setting

The court also concluded that the EIR provided an adequate description of the environmental conditions in the vicinity of the project by relying on historical measurements of water to determine how the existing physical conditions without the project could most realistically be measured. The court disagreed with the trial court that an exhaustive quantification of existing water rights was necessary. Here, historical use could determine the quantitative limits on the amount of water that a pre-1914 water appropriator could divert, and the KWBA had the discretion to rely on historical measurements to determine how existing physical conditions without the project can most realistically be measured.

Environmental Impacts Analysis

The court found that the EIR adequately discussed potential impacts on existing water rights and groundwater levels.

Regarding the first impact listed above, the project only sought to use unappropriated water, which excluded water being used pursuant to existing water rights, meaning that no significant impacts would occur to existing water rights. The EIR's conclusion that no mitigation was required because the project was not expected to have a significant impact on the existing water supply was supported by substantial evidence.

The court also overturned the trial court by finding that the EIR adequately assessed the impacts of long-term recovery operations on groundwater levels. The EIR determined that even maximum recovery volumes during a three to six year drought would not change substantially because no new recovery facilities would be built. The EIR further noted that even extended recovery periods would not exceed banked water quantities or result in changes to ground water levels. Substantial evidence supported the EIR's conclusion that there would not be significant impacts on groundwater levels because the project would not increase long-term recovery beyond historical operations.

Conclusion and Implications

In rejecting the petitioner's arguments under the CEQA and the lower trial court decision, the Second District Court of Appeal reiterated the principle that an Environmental Impact Report need not include a fully exhaustive environmental analysis nor perfection. With regard to the project it is enough that a local agency make a good faith effort in an EIR disclose

that which it reasonably can based on information that is reasonably available. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B309764.PDF.
(Travis Brooks)

CALIFORNIA COURT OF APPEAL UPHOLDS ENVIRONMENTAL ANALYSIS FOR IRRIGATION DISTRICT'S WATER TRANSMISSION PIPELINE PROJECT

Save the El Dorado Canal v. El Dorado Irrigation District,
___Cal.App.5th___, Case No. C092086 (3rd Dist. Feb. 16, 2022).

California's Third District Court of Appeal in *Save the El Dorado Canal v. El Dorado Irrigation District* rejected a challenge under the California Environmental Quality Act (CEQA) to the El Dorado Irrigation District's (District) approval of the Upper Main Ditch piping project and Blair Road Alternative, finding that substantial evidence supported the District's determination that the project and approved alternative would have less than significant impacts. The court rejected petitioner's claims that the Environmental Impact Report's (EIR) project description and analyses of hydrological, biological, and wildfire impacts were insufficient.

Factual and Procedural Background

The El Dorado Irrigation District operates a primarily surface-water system in El Dorado County to meet the region's potable water demands. The system contains more than 1,250 miles of pipe and 27 miles of earthen ditches that connect the system's facilities and treatment plants. The Upper Main Ditch (UMD) is the system's main conveyance feature and is comprised of a three-mile open and unlined ditch that connects the system's Forebay Reservoir to the Reservoir 1 Water Treatment Plant (WTP).

The Conversion Project

In June 2015, the District issued an initial study and notice of preparation for a proposed project that would convert the UMD in to a buried 42-inch pipeline that spanned the length of the existing ditch. The upstream end of the new pipeline would connect to the Forebay Reservoir and the downstream end would connect to a new metering and inlet structure at the Reservoir 1 WTP. After placing the pipeline, the District would backfill the pipe and reshape the ditch to allow for the passage of stormwater flows up to the current ten-year storm event capacity. Ultimately, the project would improve water conservation by reducing the amount of water currently lost to seepage and evaporation (approximately 11-33 percent), as well as water quality by reducing infiltration of contaminants that subsequently overburdened the system's water treatment plants.

The Blair Road Alternative

In addition to the proposed project, the District considered three alternatives. The Blair Road Alternative would also convert the UMB into a buried 42-inch pipeline, but instead of running the pipe along the existing ditch, the pipe would be placed across approximately 400 feet of District-owned property from the Forebay Reservoir to Blair Road, continue along the road until it reached the UMD crossing, then travel across private property to the Reservoir 1 WTP. The upstream and downstream connections would remain the same and the alternative would construct the project in the same manner.

The CEQA Process and Litigation

Between June 2015 and June 2018, the District engaged in an extensive public engagement process to seek comments and feedback on the scope of the project and EIR. In June 2018, the District circulated a draft EIR. The DEIR's project description described the location of the UMD and the setting's history of storm flows and drainage. The DEIR also described the Blair Road Alternative's setting and noted that,

should it be adopted, the District would no longer use the existing ditch—instead reverting the land back to private landowners.

After an extended public comment period, the District issued the final EIR in January 2019. In April 2019, the District's board of directors (Board) adopted a resolution approving the Blair Road Alternative, certified the FEIR, and adopted a mitigation monitoring and reporting program. While the Board found that the initial project would achieve the project's objectives, the original project would have greater potential impacts to residents along the ditch from the resulting construction and eminent domain proceedings. The Board thus concluded the Blair Road Alternative would be feasible under CEQA because it would involve less construction activity near residents, require the removal of fewer tress, and reduce the number of easements across private property.

In May 2019, petitioner, Save the El Dorado Canal, filed a petition for writ of mandate alleging the project violated CEQA. The trial court denied each of petitioner's ten contentions. Petitioner timely appealed.

The Court of Appeal's Decision

On appeal, petitioner re-alleged that the project violated CEQA because the EIR contained an inaccurate project description and failed to adequately analyze potential impacts to hydrology, biological resources, and wildfire hazards. Under an abuse of discretion standard, the Third District Court of Appeal rejected each claim, finding that substantial evidence supported the District's determination and petitioner failed to demonstrate otherwise.

Adequacy of Project Description

Petitioner alleged the EIR failed to adequately describe the project by omitting the "crucial fact" that the ditch that would soon be abandoned was the "only drainage system" for the watershed. In advancing this argument, petitioner's briefing not only alleged deficiencies with the project's description, but also the EIR's environmental setting and impact analyses. The court of appeal noted that compounding these arguments under one heading was "problematic" and needed to be under a "separate heading" in order to properly raise these issues.

Notwithstanding this, the court considered whether the EIR provided an "accurate, stable, and finite" description of the project's location, boundaries, objectives, and technical, economic, and environmental characteristics. In so doing, the court rejected petitioner's assertion that the EIR "failed to disclose the true nature of the Upper Main Ditch." Rather, the EIR provided a detailed description of the UMD's size, history, and location, and explained how the UMD passively intercepts stormwater runoff that would otherwise naturally flow down slope. With respect to the Blair Road Alternative, the EIR explained that the ditch would continue to passively receive and convey stormwater flows during storm events, even after the District abandoned its maintenance easement over it. The court concluded this evidenced an adequate, complete, and good faith effort at full disclosure about the Main Ditch and its relationship to the watershed's drainage system, as well as the District's intent to abandon the ditch should it adopt the Blair Road Alternative.

Impacts to Hydrology

Petitioner claimed the EIR inappropriately concluded that the Blair Road Alternative would not significantly impact watershed drainage because abandonment would permit "the underlying property owners to do with [the ditch] as they please." Citing a comment letter submitted by the County of El Dorado, petitioner claimed the EIR failed to mitigate foreseeable impacts to watershed drainage that will result when the abandoned ditch becomes clogged with vegetation and debris.

The court disagreed, citing the FEIR's response to the County's comment letter, which explained that private action or inaction will ensure the abandoned ditch retains its current capacity to convey stormwater across their property thereby reducing any risk of significant flooding. Moreover, unlike the District, the County can regulate private fill activities via administrative and civil penalties to ensure such activities do not yield significant environmental effects. For these reasons, it would be too speculative to predict landowners' particular actions or inactions and the ensuing potential effects to the ditch's stormwater conveyance capacity. Petitioner failed to point to any substantial evidence in the record to suggest otherwise to explain how the EIR's drainage analysis is inadequate.

Impacts to Biological Resources

Petitioner also alleged the EIR inadequately analyzed the project's potential impacts to biological resources by failing to mitigate impacts to riparian habitats and sensitive natural communities, and by conflicting with local policies and ordinances that protect such resources. The court noted that the EIR found the Blair Road Alternative would result in less potential biological impacts because it would be located within an existing road corridor devoid of riparian habitat and require less trees to be removed. As with the initial project, any impacts to vegetation communities—including those resulting from tree removal—would be mitigated to less than significant levels through permit acquisition and compliance. In turn, the Alternative would be consistent with the General Plan's biological resources management plan, the County's tree mortality removal plan, and CALFIRE's tree removal procedures. And, contrary to petitioner's assertion, compliance with these plans via mitigation measures would not increase the spread of bark beetle populations, thereby resulting in significant impacts.

The court also rejected petitioner's assertion that the County ignored comments submitted by the California Department of Fish and Wildlife (CDFW). Petitioner claimed CDFW's comment directed the County to obtain a streambed alteration agreement and consult with the U.S. Army Corps of Engineers, should construction implicate Waters of the United States (WOTUS). The County's response noted that the project and Alternative were specifically designed to avoid WOTUS, but nevertheless would be required to mitigate any such impacts. The EIR explained that the riparian habitat affected by the project is not a naturally occurring waterbody, thus, plant and wildlife species are not dependent on water in the ditch. The court concluded this response was more than adequate to address CDFW's comment.

Finally, the court was not swayed by petitioner's claim that the EIR failed to adequately analyze and mitigate impacts to tree mortality. The court pointed to the EIR's explanation that trees surrounding the project site are not native riparian species, and thus, are not dependent on water conveyed through the ditch. To the contrary, most of the adjacent tree species are stress-tolerant and can withstand climatic variation and changes in water seepage. Thus, the EIR provided facts, reasonable assumptions, and expert opinion to satisfy the District's substantial evidence burden.

Wildfire Hazards Analysis

The court rejected petitioner's final contention that the EIR failed to adequately consider the entirety of the project's fire risks, and instead only considering construction-related impacts. Petitioner asserted the project would have potentially significant impacts by removing a water source that could be used as a firefighting tool. The court disagreed by noting that the EIR specifically debunked petitioner's claim—water in the ditch is intended as a drinking water supply and does not supply water for firefighting. Contrary to petitioner's claim and related comment letter, water from the ditch had never been used to fight prior fires and the CALFIRE Strategic Fire Plan did not include the UMD as a potential firefighting resource. Absent substantial evidence to the contrary, petitioner had not carried its burden of demonstrating the EIR's analysis was unsupported.

Conclusion and Implications

The Third District Court of Appeal's opinion offers a straightforward analysis of well-established CEQA tenants that govern a legally sufficient EIR and project alternatives. The court reiterated that CEQA does not mandate perfection, but rather a good faith effort at full disclosure of the project's description and impact analysis. To this end, an EIR may make some assumptions about future scenarios, but need not consider indirect impacts that are too speculative to predict. Finally, the opinion underscores the procedural and evidentiary burdens a CEQA challenger must satisfy to avoid forfeiting their arguments: a brief must raise separate and distinct issues under separate headings, and must lay out substantial evidence favorable to the agency and explain why it is lacking. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/C092086.PDF.
(Bridget McDonald)

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